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MULPHA KLUANG MARITIME CARRIERS SDN BHD v. PHILIP KOH TONG NGEE & ORS

HIGH COURT MALAYA, SHAH ALAM
ROZANA ALI YUSOFF JC
[SUIT NO: 22NCVC-682-11-2013]
15 JULY 2015

B

LEGAL PROFESSION: *Duty to client – Conveyencing – Sale and purchase of property – Client sought damages for breach of contractual duty and/or negligence by solicitors – Whether solicitors owed a duty of care to client – Whether solicitors breached their duty – Whether damages suffered by client too remote – Whether client contributory negligent*

C

LEGAL PROFESSION: *Duty of care – Negligence – Sale and purchase of property – Client sought damages for breach of contractual duty and/or negligence by solicitors – Whether solicitors owed a duty of care to client – Whether solicitors breached their duty – Whether damages suffered by client too remote – Whether client contributory negligent*

D

TORT: *Negligence – Duty of care – Solicitor-client relationship – Sale and purchase of property – Client sought damages for breach of contractual duty and/or negligence by solicitors – Whether solicitors owed a duty of care to client – Whether solicitors breached their duty – Whether damages suffered by client too remote – Whether client contributory negligent*

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The plaintiff filed an action against the defendants, the solicitors retained by the plaintiff, in respect of a sale and purchase ('S&P') of two plots of land ('two lots'), for breaching their contractual duty and/or negligence against the plaintiff. The plaintiff discovered after payment of the full purchase price for the two lots to the vendors that, a certain amount of the land area for the two lots had been surrendered by the vendor to the State Authority ('surrendered area'). The plaintiff submitted that it had executed the S&Ps in reliance of the defendants' assurance and advice. Thus, the plaintiff claimed that the defendants ought to have advised the plaintiff of the surrendered area, and in failing to do so they had failed to exercise professional skill, care and diligence and/or safeguard the interest of the plaintiff. Accordingly, the plaintiff sought general, special and exemplary damages. The defendants, on the other hand, contended that the calculation of the two lots was on a was on a per lot basis; and the plaintiff was contributory negligent as it was a large conglomerate equipped with its own internal legal advisors and had extensive experience of commercial development and in depth knowledge that could have detected the surrendered area. Hence, the main issues to be decided were, (i) whether the defendants owed a duty of care as a solicitor to the plaintiff in handling the S&P transaction of the two lots; (ii) whether the defendants breached their duty; (iii) whether the damage suffered by the plaintiff as a consequence from the breach was not too remote.

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Held (allowing plaintiff's claims with costs):

(1) The extent of a solicitor's duty to their client was determined by both the retainer with the client and the solicitor's general law duty of care. A general retainer for example, to act for a conveyance for a client, would encompass both specific duties under the retainer and the concurrent duties in tort. To fulfil those duties, a solicitor under such a retainer would be required to take proactive steps to ensure to advise the client not only of the matters where advice was specifically requested, but also in relation to matters which the solicitor acting with reasonable skill and diligence would foresee as a risk to the client. (para 26)

(2) It is the duty of a conveyancing solicitor to ensure that all the documents pertaining to the transaction of land must be properly prepared, to carry out a thorough inquiry and to ensure that all the details which were stated in the transaction document was correct. In this instance, the defendants owed a duty of care to advise the plaintiff of the implications of the endorsement of the surrendered area for the two lots. The defendants' duty extend beyond mere documentation and includes the duty to warn the plaintiff of anything that was unusual and anything that affect the plaintiff obtaining the benefit of the contract which he sought to obtain. Further, the defendants also had a duty to the plaintiff before the release of the balance purchase price the two lots and to prevent such release to the vendors after being informed by the plaintiff's representative of the surrendered area. (para 26)

(3) Here, the defendants who had the necessary expertise had failed to safeguard and protect the plaintiff's interest. The defendants also failed to provide professional advice on the said endorsement including inserting the actual area for the two lots and additional provisions in the respective S&P agreements for the protection of the plaintiff. Under the circumstances, the conduct of the defendants had fallen well below the standards expected of a prudent conveyancing solicitor. Therefore, the defendants had breached their duty of care and were liable for negligence. (paras 26)

(4) The basis of calculations of the size for the two lots was agreed by both parties and were indeed calculated on a per square foot basis. The defendants in this case could not now blow hot and cold in putting up their defence that the basis of calculation was on a per lot basis. Accordingly, the plaintiff had suffered losses in purchasing the two lots which were less than what was warranted in the S&P agreement. Furthermore, the defendants had admitted and accepted the plaintiff's loss. Therefore, the damage suffered by the plaintiff was deemed to be admitted and accepted. (para 26)

(5) It was incumbent for the defendants in their capacity as the solicitor, to provide legal advice and to exercise all reasonable care, skill and diligence and demonstrate professional competence in attending the plaintiff's requirement and protecting the plaintiff's legal interest. The defendants could not be absolved from all liabilities just because the plaintiff was a large conglomerate. Consequently, there was no act of contributory negligence on the part of the plaintiff as claimed by the defendants. (para 26)

(6) Exemplary damages or punitive damages stand apart from awards of compensatory damages. They were additional to an award which was intended to compensate a plaintiff fully for the loss he had suffered, both pecuniary and non-pecuniary. They were intended to punish and deter. In this case, the court was of a view that it was not a case for exemplary damages. (para 26)

Case(s) referred to:

Hawkins v. Clayton (1988) 164 CLR 539 ***(refd)***
Kuddus v. Chief Constable of Leicestershire Constabulary [2001] UKHL 29 ***(refd)***
Lai Foh & Sons Sdn Bhd v. Skrine & Co [2001] 3 CLJ 185 HC ***(foll)***
Lee Chee Kiang v. Johnson Tan Teck Seng & Anor [2011] 9 CLJ 498 HC ***(refd)***
Macindoe v. Parbery (1994) Aust Torts Reports 81-290 ***(refd)***
Megat Najmuddin Megat Khas & Ors v. Perwira Habib Bank Malaysia Bhd [2003] 3 CLJ 816 CA ***(refd)***
Messrs Yong & Co v. Wee Hood Teck Development Corp Ltd (1) [1984] 1 CLJ 353; [1984] 1 CLJ (Rep) 251 FC ***(refd)***
Neogh Soo Oh & Ors v. G Rethinasamy [1983] 2 CLJ 218; [1983] CLJ (Rep) 663 HC ***(refd)***
Sykes v. Midland Bank Executor and Trustee Co Ltd [1971] 1 QB 113 ***(refd)***
Tan Sri Datuk Ibrahim Mohamed v. Leong Tuck Onn & Anor [2012] 6 CLJ 662 HC ***(refd)***

Legislation referred to:

National Land Code, s. 202(3)

For the plaintiff - Tan Lee Kiat; M/s Othman Hashim & Co
For the defendants - Wong Hok Mun; M/s Azim, Tunku Farik & Wong

Reported by S Thara

JUDGMENT

Rozana Ali Yusoff JC:

Introduction

[1] The plaintiff's cause of action against the defendants is on the ground that the defendants, being the solicitors who were retained by the plaintiff, in respect of the sale and purchase of two plots of land, have breached its contractual duty, and/or negligence against the plaintiff. The claims are as follows:

(a) General damages to be assessed;

(b) Special damages for the sum of RM3, 316,941.60;

(c) Exemplary damages;

(d) Interest at the rate of 5% per annum on the damages of para (a) and (c) from the date of filing of this suit until the date of full and final settlement;

(e) Interest at the rate of 5% per annum on RM3,316,941.60 from 7 January 2010 until the date of full and final settlement;

(f) Cost on client and solicitors basis; and

(g) Such further and other relief that this Honourable Court may deem fit.

Backgrounds Facts

[2] Plaintiff is a company incorporated in Malaysia under the Companies Act 1965 having its registered address at 30.02, 30th Floor, Menara Multi Purpose, Capital Square, No. 8, Jalan Munshi Abdullah, 55100, Kuala Lumpur.

[3] The first defendant until the seventh defendant are partners in a law firm practicing under the name and style of Messrs Mah-Kamariyah & Philip Koh, whose address for service is at 3A07, Block B, Phileo Damansara II, No. 15, Jalan 16/11, Off Jalan Damansara, 46350, Petaling Jaya, Selangor.

[4] The plaintiff seeks advice and legal services from the defendants for the sale and purchase (S&P) transaction of two lots of land; namely

(a) Undivided land of 12/13 share in all that piece of freehold land held under Grant 28274 for No. Lot 643, Seksyen 67, in the Bandar Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan Kuala Lumpur measuring in area approximately 828.314 square metres or 8,230.0594 square feet together with a single-storey bungalow house with the postal address of No. 3C, Jalan Imbi, 55100 Kuala Lumpur (Lot 643) owned by Lew Yew Tiam for the purchase price of RM5,538,462; and

(b) A piece of vacant freehold land held under Grant No. 28275 Lot 644 Seksyen 67 in Bandar Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan Kuala Lumpur, measuring in area approximately 656.328 square metres (or 7064.656 square feet owned by Thong Honn (Housing Development) Sdn Bhd (Lot 644) for the purchase price of RM6,000,000.

[5] After the full payment of the purchase price for Lots 643 and 644 to the vendors, the plaintiff discovered that the land area measuring 3,133 square feet for Lot 643 and the land area measuring 1,614 square feet for Lot 644 have been surrendered by the vendor to the State Authority in 1988.

("surrendered area") The "surrendered area" for Lot 643 and Lot 644 have been endorsed in the issue document of title of Lot 643 and Lot 644 and also on the land searches conducted by the defendants

[6] As a result of the above circumstances and based on legal advice of the defendants, the plaintiff sued the vendors at the Kuala Lumpur High Court *vide* Civil Suit S-22-100-2010. However, the plaintiff's claim was dismissed on 6 June 2013 and later was affirmed by the Court of Appeal on 11 August 2014 *vide* Civil Appeal W-02-1495-07-2013.

Witnessess

[7] The plaintiff's witnesses.

(a) PW1 - Ms Kheoh And Yeng - Director of the plaintiff

(b) PW2 - Dato' Cheah Siong Lack @ Ray Cheah - Authorised representative in the negotiation of the sale and purchase transaction for the two lots.

[8] The defendants witness:

(a) DW1 - Koh Yew York - the second defendant and advocate & solicitor and partners of the Messrs Mah-Kamariyah & Philip Koh.

Plaintiff's Submission

[9] The plaintiff contended that defendants have breached the contractual duty, express and/or implied duty and/or duty of care to the plaintiff when they failed, neglected and/or omitted to advise and/or notify plaintiff of the implications of "surrendered area" for Lot 643 and Lot 644 and to conduct further and full investigations/inquiry on the endorsement stated in the land searches and issue document of title of Lot 643 and Lot 644 and/or to provide further professional advice on the said endorsement, including to insert the actual areas for Lot 643 and Lot 644 and also additional provisions in the first and second S&P to protect and safeguard the plaintiff's interest.

[10] The plaintiff submitted that in reliance of the defendants' assurance and advice as well as the defendants' expertise as a conveyancing solicitor, the plaintiff executed the first and second S&Ps. On 31 December 2009 the plaintiff had paid RM41,708.50 to the defendants being the professional fees and disbursement charged on the plaintiff for the services rendered on the sale and purchase transaction for Lot 643 and Lot 644 but after the release of the balance purchase price only realised that the actual land area transferred to the plaintiff were lesser than the warranted land area as stated in the first and second SPAs for Lots 643 and 644.

[11] The plaintiff submitted that it knew about of the surrendered portion of the land not from the defendants but only after engaging the Valuer Burgess Rawson Sdn Bhd to value Lots 643 and 644. The plaintiff also discovered that the portion of the Lot 643 with the land area measuring 3,133 square

feet and Lot 644 with the land area measuring 1,614 square feet had been voluntarily surrendered to the State Authority on 10 July 1986. Further, it was the plaintiff who had to inform the defendants of Burgess Rawson's discovery before instructing the defendants to inquire with the KL Land Office on the status of the land. Subsequent to the execution of the first and second S&Ps on 12 October 2009, the defendants have knowledge that a portion of the land for Lots 643 and 644 have been surrendered to the State Authority. The defendants however proceeded to release the balance purchase price of Lots 643 and 644 to the vendors' solicitors. Moreover DW1 admitted that he was aware of the endorsement in the land search conducted on 15 October 2010 and parts of the land in Lots 643 and 644 have been surrendered to the State Authority.

[12] In submitting that the defendants had failed as the plaintiff's conveyancing solicitor to conduct a proper search on Lots 643 and 644 in the KL Land Office before the execution of the first and second SPAs and/or before the release of the balance price, the plaintiff cited the case of *Neogh Soo Oh & Ors v. G Rethinasamy* [1983] 2 CLJ 218; [1983] CLJ (Rep) 663; [1984] 1 MLJ 126 where the court held as follows:

> The defendant had failed in his duty to use reasonable care and skill in giving his advice and taking such action as the facts of this particular case demanded of a normally competent and careful practitioner here. Apart from a search in the Interim Register he should have also, like other normally competent and careful solicitors, made a search at or an enquiry with the land office concerned. He was therefore liable to compensate his clients for the loss caused by his breach of contractual duty as their solicitor. He was also liable in tort, quite independent of contract, as a professional man professing special skill who gives assistance to another and owed a duty of care to that other person who to his knowledge relied on his skill. The defendant would therefore be ordered to pay $31,000.00 together with interest at 6% p.a. to the plaintiffs

[13] The plaintiff also submitted that in the High Court Kuala Lumpur in the previous Civil Suit No. S-22-100-2010 (affirmed by the Court of Appeal) whereby the plaintiff had sued the vendors of Lots 643 and 644 as first and third defendants as well as the solicitors of the vendors, Messrs Chin & Co as the fourth defendant, the court upon finding of facts finds that the defendants in their capacity as the plaintiff's solicitors ought to have advised the plaintiff of the said surrender of the lands known as Lot 643 and Lot 644. The learned judge held *inter alia* as follows:

> The said endorsement could have easily been detected if a proper preliminary search had been carried out as the Plaintiffs were represented by solicitors at the material time one can assume this was not done. In fact, the solicitors in charge of the matter clearly admit that this was so. See pages 52-57 Defendant's submission ...

> Had they done so, not only could the Plaintiffs been advised earlier and the said solicitor could have decided whether there are additional provisions to be included in the respective Sale and Purchase Agreement for the protection of the Plaintiffs. From the evidence, it is clear the said solicitor did not and the Plaintiffs would have to bound by the endorsements on the said titles ...

[14] The plaintiff submitted that defendants have failed to exercise professional skill, care and diligence and/or safeguard the interest of the plaintiff in handling the sale and purchase transaction for Lot 643 and Lot 644, when at all material times, the defendants knew or ought to have known that the purchase price for Lot 643 that the plaintiff agreed to pay to the vendor was for 12/13 undivided share of the entire 828.314 square metres and the purchase price for Lot 644 that the plaintiff agreed to pay to the vendor was for the entire 656.328 square metres.

[15] The plaintiff pleaded that the defendants were negligence in their duty of care as a legal firm as per particulars of negligence in the statement of claim in respect of the land transaction of Lot 643 and Lot 644. The particulars are as follows:

(a) The second defendant and/or the legal assistants and/or servants of the said legal firm has failed, neglected and/or omitted in carrying a thorough inquiry and/or investigation on the lands of Lot 643 and Lot 644.

(b) The second defendant and/or the legal assistants and/or servants of the said legal firm has failed, neglected and/or omitted in informing/notify the plaintiff that the land area measuring 3,133 square feet for Lot 643 and the land area measuring 1,614 square feet for Lot 644 had been surrendered to the State Authority in 1988.

(c) The second defendant and/or the legal assistants and/or servants of the said legal firm has failed, neglected and/or omitted in finding that the land area measuring 828.314 square metres or 8,230.0594 square feet for Lot 643 and the land area measuring 656.328 square metres or 7064,656 square feet for Lot 644 that stated in the land searches are not the net land areas for Lot 643 and Lot 644 at the material time.

(d) The second defendant and/or the legal assistants and/or servants of the said legal firm has failed, neglected and/or omitted in advising the plaintiff of the implications of the endorsement of the "surrendered area" for Lot 643 and Lot 644.

(e) The second defendant and/or the legal assistants and/or servants of the said legal firm has failed to exercise professional skill, care and diligence in advising the plaintiff and handling the sale and purchase transaction for Lot 643 and Lot 644.

(f) The second defendant and/or the legal assistants and/or servants of the said legal firm has failed, neglected and/or omitted to halt or prevent the release of the balance purchase price of Lot 643 and Lot 644 to the vendors after being informed by the plaintiff's representative of the "surrendered area" for Lot 643 and Lot 644.

(g) The second defendant and/or the legal assistants and/or servants of the said legal firm has failed, neglected and/or omitted in advising the plaintiff before the release of the balance purchase price for Lot 643 and Lot 644 to the vendors' solicitors.

(h) The second defendant and/or the legal assistants and/or servants of the said legal firm has failed to exercise professional skill, care and diligence in handling the sale and purchase transaction for Lot 643 and Lot 644, when at all material times, the said legal firm knew or ought to have known that the purchase price for Lot 643 that the plaintiff agreed to pay to the vendor was for 12/13 undivided share of the entire 8,230.0594 square feet and the purchase price for Lot 644 that the plaintiff agreed to pay to the vendor was for the entire 7064.656 square feet.

(i) The second defendant and/or the legal assistants and/or servants of the said legal firm has failed to protect and/or safeguard the interest of the plaintiff when acting for the plaintiff in the sale and purchase transactions for Lot 643 and Lot 644.

[16] The plaintiff submitted that there is no contributory negligence on the part of the plaintiff as well as PW2 as their representatives since they were only made aware of the surrender of the two lots after the first and second S&P were executed and after the defendants had released the payment of the balance purchase price to the vendors' solicitors. In fact the defendants in their capacity as the plaintiff's solicitors at all material times has never advised PW2 or the plaintiff of the effect or outcome that may arise as a result of the land surrender of the Lot 643 and Lot 644. It was the plaintiff who had first discovered that parts of Lots 643 and 644 had been surrendered to the State Authorities.

[17] The plaintiff submitted that the defendants contentions that the plaintiff and its representatives have actual knowledge or imputed knowledge of the differences in the land sizes is devoid of merit or an afterthought. The plaintiff submitted that during the cross-examination DW1 agreed with the plaintiff's counsel that he only assumed and belief that PW2 had knowledge that the reduced land size. DW1 also agreed that if the plaintiff has not conducted the valuation after the payment of the balance purchase price that surrendered portion would not have been known.

[18] The plaintiff contended that they relied solely on the legal advice given by the defendants in their capacity as the solicitors of the plaintiff had suffered losses due to the breach of the duty of care by the defendants and

the plaintiff cannot be said to have contributed to the losses. The defendants should exercise all reasonable care, skill and diligence and demonstrate professional competence in attending to the plaintiff's requirement and protecting the plaintiff's legal interest as held in *Megat Najmuddin Megat Khas & Ors v. Perwira Habib Bank Malaysia Bhd* [2003] 3 CLJ 816, as follows:

> The fact that the respondent never asked for specific advice in writing from the appellants did not absolve the appellants from liability for the negligent advice. On the facts, the appellants' advice that the LHC was sufficient security was the cause of the respondent disbursing the first OD and, subsequently, the second OD to the borrower to its detriment. Hence, the learned judge was justified and right to have concluded that although the appellants were not liable for the separate facility of RM200,000 granted on a clean basis before the matter was referred to the appellants, they were liable in negligence to the respondent for the loss suffered in respect of the entire sum on the first OD.

[19] The plaintiff submitted that they have purchased Lot 643 with the land area measuring 8,230.0594 square feet and the whole of Lot 644 with the land area of 7,064.656 square feet for the purchase price of RM5,538,462 and RM6,000,000.000 respectively. In such a case the plaintiff had suffered loss for the amount of RM3,316,941.60 for a shortfall of 3,133 square feet for Lot 543 and 1,614 square feet for Lot 644. The details of plaintiff's losses are as follows:

Lot 643 Total land area of the undivided 12/13 share (including the "Surrendered Area")	8,915.898 sqftx 12/13 share	8,230.0594 sq ft
Purchase Price per square foot	RM5,538,462/8,230.0594 sq ft	RM672.95 psf
Overpayment for the "Surrendered Area"	3,133 sq ft x 12/13 share x RM1,946,171.40	RM672.95 psf
Lot 644 Total land area (including the "Surrendered Area")		7064.656 sq ft
Purchase Price per square foot	RM6,000,000/7,064.656 sq ft	RM849.30 psf
Overpayment for the "Surrendered Area"	1,614 sq ft x RM849.30 psf	RM1,370,770.20
Total loss for the "Surrendered Area"	RM1,946,171.40 + RM1,370,770.20	RM3,316,941.60

[20] The plaintiff also submitted that the defendant is estopped from denying that the plaintiff did not suffer any loss since DW1 had agreed the land area actually transferred to the plaintiff for Lot 643 and 644 was lesser than what they purchased and the plaintiff did suffer loss because based on the terms of the agreement they did not get what the plaintiff had contracted for under the S&Ps. The plaintiff also submitted states that the defendant accepted the plaintiff's loss because they had failed to challenge PW1 about the loss suffered by the plaintiff. Therefore, based on the above, the plaintiff is entitled to the sum of RM3,316,941.60 being the loss suffered by the plaintiff for the value of the surrendered portion of the land which was paid to the vendors under the S&Ps and the defendants is liable to the plaintiff's loss.

Defendants' Submission

[21] The defendants submitted that the plaintiff does not have a cause of action in tort and/or contract. The defendant contended that the purchase price of Lot 643 and Lot 644 was on a "per lot" and not per square foot basis. The defendants had exercised a reasonable degree of skill and care to be expected of a competent and reasonably experienced solicitor and had interpreted the searches to mean that the respective areas of Lot 643 and Lot 644 are 8,230,0594 and 7,064,656 square feet respectively. Thus the defendants had discharged its duty of care to the plaintiff, both in contract and tort, by ensuring that the vendors warranted the areas of Lot 643 and Lot 644 in the S&Ps and the plaintiff chose to complete the purchase despite knowing that the express warranties by the vendors as to the size of Lot 643 and Lot 644 had been breached.

[22] The defendants denied that any loss or damage suffered by the plaintiff was caused by the defendants. If there were losses it was contributed by the negligence of the plaintiff because at all material times, the plaintiff or its representative were appraised of the searches and condition of the lots. The plaintiff including PW1, PW2, the commission agent and the Legal Manager of plaintiff were all experienced, qualified and trained to have detected and ought to have known or should have alerted the plaintiff as to the surrender of a portion and the procurement of a valuation report on Lot 643 and Lot 644 prior to the completion of the purchase.

[23] In the alternative, the defendants submitted that the plaintiff has not suffered any loss because the surrender of a portion of the lands as endorsed was as a result of the vendors' application for planning permission and a development order. The surrendered land was for the purposes of *inter alia*, a road reserve. The vendors' application did not come to fruition as the development did not take place. Accordingly the plaintiff can reclaim the surrendered portion from the authorities.

[24] The defendant submitted that the plaintiff's purchase was motivated by and with a view to develop Lot 643 and Lot 644. Therefore, the plaintiff would have to apply for planning permission and or a development order in

due course anyway which will result in the relevant authorities imposing similar conditions as was imposed on the vendors, that is to say provisions of a surrender for purposes *inter alia*, of a road reserve. Further, the plaintiff's suit against the vendors in Kuala Lumpur High Court Suit No S-22-100-2010 is already *res judicata* and the issue of estoppel operates against the plaintiff since the purchase of the lots was on a per lot basis. Since the plaintiff did not suffer any losses, their claims should be dismissed with costs.

Issues

[25] Having heard the submission from both parties the court is of the view that the issues to be decided are as follows:

(a) whether the defendants owed a duty of care as a solicitor for the plaintiff in handling the sale and purchase transaction of the two lots;

(b) the defendants breached the said duty; and

(c) the damage suffered by the plaintiff as a consequence from the breach is not too remote.

Findings

[26] Having considered the evidences and the submission of parties, the court arrived to the findings as follows:

(a) In our legal system, the solicitor and client relationship has long been recognised as a fiduciary relationship. The term "fiduciary" means trust, so in a fiduciary relationship the client places his or her confidence, good faith, reliance and trust in the solicitor, whose advice is sought in some matter. A fiduciary relationship creates many legal duties for the solicitor in whom the trust has been placed. Generally the solicitor must act in the best interests of the client including to act honestly and fairly in a client's best interests; to act with due skill and diligence, reasonable promptness; and courtesy and communicate effectively and promptly with clients. In the context of a property transaction the case of *Macindoe v. Parbery* (1994) Aust Torts Reports 81-290 held that it will include a duty to warn the client of anything that is unusual or anything which may affect the client obtaining the full benefit of a contract entered into. In *Hawkins v. Clayton* (1988) 164 CLR 539 at 578-579;78 ALR 69 held that it is a trite law that a lawyer owes their client a duty of care requiring the lawyer to take reasonable steps to avoid their client suffering foreseeable economic loss.

(b) The extent of a solicitor's duty to their client is determined by both the retainer with the client and the solicitor's general law duty of care. A general retainer for example, to act for a conveyance for a client, will encompass both specific duties under the retainer and the concurrent

duties in tort. To fulfil these duties a solicitor under such a retainer will be required to take pro active steps to ensure to advise the client not only of the matters where advice is specifically requested, but also in relation to matters which the solicitor acting with reasonable skill and diligence would foresee as a risk to the client. The ultimate test is that; firstly, that the defendant owes a duty of care; secondly, that he breached it; thirdly, that the plaintiff have suffered a loss; and finally, that the defendant's conduct caused that damage ("causation"). In *Tan Sri Datuk Ibrahim Mohamed v. Leong Tuck Onn & Anor* [2012] 6 CLJ 662, the court held as follows:

> (2) To succeed in the tort of negligence against the solicitor, it is incumbent on the client to establish that: (i) the solicitor owes the client a duty of care; (ii) there is a breach of that duty by the solicitor; (iii) the client has thereby suffered damage and (iv) the damage is not too remote. (para 15)
>
> (3) TSI and the defendants had a close business relationship and TSI considered the defendants, in particular DW1, as his trusted business and legal *confidante*. The defendants, as TSI's legal advisers, were bound to warn their client of the risks involved. It is the solicitor and not the client who has the better opportunity to assess and evaluate the gravity or remoteness of the risk involved in a particular transaction and it is the solicitor who has the necessary expertise to analyse and guard against the risk. As such, the defendants had breached that duty of care. (paras 17 & 35)
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> (4) Where the solicitor is in breach of his contractual duty to his client, or where he fails to use proper care and as a result his client suffers loss, he is liable in damages even if the claim in negligence was purely for financial loss. In this case, there was a breach of duty by the defendants and as a result, the plaintiff suffered loss and damages. (paras 38 & 40)

The First Issue - Duty Of Care

(i) it is an undisputed fact that the plaintiff had retained the defendants to advise and provide legal services in respect of the transaction of the two lots and to handle all conveyancing matters including the preparation S&P agreement, memorandum of transfer, land searches and all other related documentation. The plaintiff had also paid the defendants RM41,708.50 being the legal fees in respect of the said services. The defendants did not take issue with regard to the existence in law of a duty of care for both the causes of action in contract and in tort. During cross-examination, DW1 himself concurred with this and stated as follows:

> Q. So would you agree with me that it would be then the duty of the solicitor to ensure that these documents were prepared properly?

DW1. Yes.

Q. Now in conveyancing matters as well would you agree with me, Mr Koh, that before the preparation of these documents it is the duty of the solicitor to ensure the details to be stated in those documents are correct? For instance the particulars of the land, particulars of the title.

DW1. Yes, based on the result of searches.

Q. You would agree that it is normal conveyancing practice.

DW1. That's right, yes.

(Refer pp. 6 and 7 of the notes of proceeding)

(ii) the court finds that it is the duty of a solicitor, in particular, a conveyancing solicitor to ensure that all the documents pertaining to the transaction of land must be properly prepared, to carry out a thorough inquiry and to ensure that all the details which is stated in the transaction document is correct. It follows that DW2 owed a duty of care to ensure that all the documents for the transaction of Lots 643 and 644 are properly prepared and also to advise the plaintiff pertaining to the transaction of the purchase of Lot 643 and Lot 644 in all legal aspect. The defendant also has the duty to inform or notify the plaintiff that the land area measuring 3,133 square feet for Lot 643 and the land area measuring 1,614 square feet for Lot 644 had been surrendered to the State Authority in 1988 and that the land area measuring 8230.0594 square feet for Lot 643 and the land area measuring 7064.656 square feet for Lot 644 that stated in the land searches are not the net land areas for Lot 643 and Lot 644 at the material time.

(iii) the court finds that the defendants owed a duty of care to advise the plaintiff of the implications of the endorsement of the "surrendered area" for Lot 643 and Lot 644 and to exercise professional skill, care and diligence in advising the plaintiff and handling the sale and purchase transaction for Lot 643 and Lot 644. The existence of a solicitor's duty of care under a retainer to advice in circumstances such as those under consideration did not depend on advice or information being specifically sought by the client. The defendants' duty extend beyond mere documentation and includes the duty to warn the plaintiff of anything that is unusual and anything that affect the plaintiff obtaining the benefit of the contract which he sought to obtained. Further, the defendants also have a duty to the plaintiff before the release of the balance purchase price of Lot 643 and Lot 644 and to prevent such release to the vendors after being informed by the plaintiff's representative of the "surrendered area". Therefore, as a solicitor, the defendants owed the plaintiff a duty of care to exercise professional skill, care and diligence demanded by law in advising all legal aspect with regard to the transactions in handling the S&P of the two lots.

The Second Issue - The Breach

(i) the plaintiff claim against the defendants is premised on the cause of action that the defendants being the solicitor have breached their duty of care against the plaintiff. In other words, the defendants failed to advise the plaintiff that a portion of the land had been surrendered to the State Authority in 1998 that had resulted to the land area of the two lots becomes lesser that what the plaintiff had purchased and fully paid.

(ii) the defendants through DW1 had testified that he had conducted the land searches and noticed that there was an endorsement on the instrument of title relating to the surrendered area. DW1 admitted during cross-examination that he did not understand the endorsement as stated in the title and was under the impression, in the light of the adjusted quit rent, that the land area stated in the title was a net area and that the surrender had already taken effect. DW1 also, in light of s. 202(3) of the National Land Code, was under the impression that the endorsement was a record of dealing and had already been taken into account the area of the land. This court is unable to agree with DW1's contention after having taken into consideration of his 15 years' experience as a conveyancing lawyer who ought to have prudently scrutinise and properly examined the instrument of title. Furthermore despite having knowledge of the surrendered area, DW1 admitted that he only gave a copy of the land search to the plaintiff but failed to advice and did not bring to the attention of the plaintiff of the said surrendered area. This also can be seen in the S&P agreement prepared by the defendants which continue to refer the full land area of the two lots without subtracting the surrendered area. DW1 also admitted it was prudent for him to advise the plaintiff of the endorsement in the title for the surrendered area.

(iii) following this the defendants ought to have advised the plaintiff of the implication of the endorsement of the surrendered area. This will definitely provide the opportunity for the plaintiff to assess and evaluate as to whether to proceed with the purchase of the two lots with the original price or at a reduced price after taking into consideration of the surrendered area. Instead, the defendants had released the balance purchased price to the vendor's solicitor including the price of the surrendered area. The defendant who has the necessary expertise had failed to safeguard and protect the plaintiff's interest by notifying the plaintiff of the implication of surrendered area for the two lots and to conduct further investigation or inquiry on the endorsement stated in the land searches and issue document of title. The defendants also failed to provide professional advice on the said endorsement including inserting the actual area for the two lots and additional provisions in the respective S&P agreement for the protection of the plaintiff. Under the

circumstances the conduct of the defendants had fallen well below the standards expected of a prudent conveyancing solicitor. In *Lee Chee Kiang v. Johnson Tan Teck Seng & Anor* [2011] 9 CLJ 498, the court held as follows:

> ... The ultimate question was not whether the defendant's conduct accorded with the practices of his profession or some part of it, but whether it conformed to the standard of care demanded by the law. That was a question for the court and the duty of deciding it could not be delegated to any profession or group in the community.

(iv) the standard of care demanded by law in respect of a conveyancing solicitor also has been cited in *Lee Chee Kiang*'s case where the court held that it is the incident of a contractual duty that a solicitor has to consult his client on all questions of doubt which do not fall within the express or implied discretion left to him. At common law the retainer imposes upon the solicitor an obligation to be skillful and careful and failure to fulfill this obligation may result in being liable in contract for negligence whether he is acting for reward or gratuitously. Since the normal rule applied by the law is that if anyone holding himself out as possessing reasonable competence in his avocation undertakes to advise or to settle a document, he owes a duty to advise or settle the document with reasonable competence and care.

(v) in *Messrs Yong & Co v. Wee Hood Teck Development Corp Ltd (1)* [1984] 1 CLJ 353; [1984] 1 CLJ (Rep) 251; [1984] 2 MLJ 39, the court held that a solicitor have a contractual duty to consult his client on all questions of doubt which do not fall within the express or implied discretion left him. In *Lai Foh & Sons Sdn Bhd v. Skrine & Co* [2001] 3 CLJ 185, held that it is pertinent to note that it was prudent for conveyancing solicitors to protect their clients' interest and the standard of care is that of requisite care and skill. In *Megat Najmuddin Megat Khas & Ors v. Perwira Habib Bank Malaysia Bhd* [2003] 3 CLJ 816, the court held that a solicitors are not absolved from negligent advice even if the client did not request for specific advice in writing. Thus, even if there were no express instructions from the plaintiff for advice in regards to the surrendered portion of the lands in Lot 643 and 644, the defendants had nonetheless breached the duty of care by virtue of failing to exercise the standard of care demanded by law.

(vi) therefore the defendants had breached the duty of care for failing to advice and exercise requisite care and skill in regards to the surrendered area and thus liable for negligence. On the other hand the plaintiffs in any event do not have a duty to instruct the defendants as to every step which needs to be taken for the S&Ps of Lot 643 and 644. It is the duty of the defendants to enquire with the plaintiff and to advise the plaintiff in the standard of care demanded by the law in all legal aspects with

regard to the transaction of sale and purchase of Lot 643 and 644. The court finds that the defendants had failed to advice the plaintiff that a portion of the land in Lot 643 and 644 had been surrendered to the State Authority despite having knowledge that the surrendered portion were endorsed on the land searches and issue document of title.

The Third Issue - The Damage

(i) the defendants submitted that the plaintiff had suffered no loss as the purchase price of Lot 643 for the sum of RM5,538,462 and Lot 644 for the sum of RM6,000,000 is based on a per lot basis and the plaintiff is estopped from raising that is on per square foot basis by reason that the High Court in Civil Suit No: S-22-100-2010 had deliberated that the purchase price for lots 643 and 644 is on per lot basis. However the plaintiff contended otherwise because the High Court Civil Suit No. S-22-100-2010 did not determine or deliberate on whether the purchase price of Lot 643 and Lot 644 is based on a per lot basis or per square feet basis and therefore, the plaintiff is not estopped to raise that the purchase price of Lot 643 and 644 is on per lot basis and the issue is not *res judicata*. In fact, the defendants in their acting for the plaintiff in the suit above mentioned had pleaded the basis of calculation for the purchase price of Lot 643 and Lot 644 was indeed on a per square feet. Further, when the defendants acting for the plaintiff in Civil Suit No. S-22-100-2010 had pleaded in statement of claim that the plaintiff had suffered the loss of RM3,316,941.60 as a result of the surrender of a portion of land for Lot 643 and Lot 644. The court accepted the submission by the plaintiff that the basis of calculations of the size for Lot 643 and Lot 644 was agreed by both parties and are indeed calculated on a per square foot basis. The defendants in this case cannot now blow hot and cold in putting up their defence that the basis of calculation is on a per lot basis.

(ii) the plaintiff had suffered losses in purchasing the two lots which were less than what was warranted in the S&P agreement in paying the vendor the value of the surrendered area. In fact DW1 agreed the land area actually transferred to the plaintiff was lesser than what was purchased. Further DW1 also agreed that the plaintiff did suffer loss because based on the terms of the agreement they did not get what the plaintiff had contracted for. DW1 during cross-examination agreed with the plaintiff.

> Q. Now please refer to same Bundle of Documents C at page 249. Line 2 from the bottom. Question by Mr Wong Chong Wah, it starts with "For whatever purpose. Doesn't really matter because the important thing is that this caveat has been surrendered and that's why you are saying as a result of the surrender the area that your client has purchased is less. Is that not the effect of your letter?" You answered, "Yes". Alright? So

in essence what you are saying there and you do agree with me that the land area actually transferred to the Plaintiff for lot 643 and 644 was lesser than what they purchased.

DW1 Yes.

(Page 149 of the Notes of Proceeding)

Q. So based on what you stated just now would you agree with me that you knew at that time that the Plaintiff did suffer loss because you advised them to claim compensation?

DW1. They were claiming for loss, yes.

Q. Yes. So you agree with me that they did suffer loss, right?

DW1. Yes.

Q. And they did suffer loss because what they got was actually lesser portion of land than what they actually wanted.

DW1. Yes, based on the terms of the agreement they did not get what they had contracted for under the agreement.

(Page 152 & 153 of the Notes of Proceeding)

(iii) the court finds that through the defendants' material witness, DW1, the defendant had admitted and accepted the plaintiff's loss and the defendants are liable to the loss. It was also evidenced that the loss suffered by the plaintiff amounting to RM3,316,941.60 was not challenged by the defendants. Therefore the court finds that the damage suffered by the plaintiff deemed to be admitted and accepted. The plaintiff is entitled for the loss suffered for the value of the surrendered portion of the land which was paid by the plaintiff to the vendors under the first and second S&Ps. The court allowed the sum of RM3,316,941.60 as damages for negligence suffered by the plaintiff.

(iv) the defendants had submitted that the plaintiff is contributorily negligent by reason that the plaintiff is a large conglomerate equipped with their own internal legal advisors and their representatives; qualified and trained registered value who has extensive experience of commercial development and in depth knowledge that could have detected the surrendered area since they knew the differences of the land area of the two lots. Nonetheless the plaintiff proceeds with the S&P transactions and this had contributed to an act of negligence. On this premise the defendants had implored that the damage be reduced in proportion with the plaintiff's contributory negligence.

(v) the court is unable to agree with the defendant's contention and finds that regardless of the status of the plaintiff and what it has, it is incumbent for the defendants in their capacity as the solicitor of the plaintiff to provide legal advice and to exercise all reasonable care, skill

and diligence and demonstrate professional competence in attending the plaintiff requirement and protecting the plaintiff's legal interest. The standing and experience of the client may be relevant to the duty of a solicitor to draw to the client attention any pitfall or risk, particularly any hidden pitfall. This does not absolve a solicitor from providing experience client, such architects or surveyors of advice in relation to unusual risk or terms; See *Sykes v. Midland Bank Executor and Trustee Co Ltd* [1971] 1 QB 113 at 130; [1970] 2 All ER 471. Applying *Lai Foh & Sons Sdn Bhd*'s case in this matter, the plaintiff had retained the defendants as their solicitors for the S&P transaction for Lot 643 and Lot 644. The plaintiff is entitled to entrust conveyancing matters to the defendants as their solicitors. The defendants cannot be absolved from all liabilities just because the plaintiff is a large conglomerate. Thus, it is the defendants' duty to advise the plaintiff of the surrendered portion of land for Lot 643 and Lot 644 and by failing to do so; the defendants had breached their duty in tort. It follows that the plaintiff had relied solely on the defendants as their solicitor and had entrusted them to handle the conveyancing matters. Therefore, the court finds that there is no act of contributory negligence on the part of the plaintiff as claimed by the defendants

(vi) the plaintiff also claimed for exemplary damages. Exemplary damages or punitive damages, the terms are synonymous, stand apart from awards of compensatory damages. They are additional to an award which is intended to compensate a plaintiff fully for the loss he has suffered, both pecuniary and non-pecuniary. They are intended to punish and deter. (see *Kuddus v. Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 AC 122. The essence of the court's discretionary jurisdiction to award exemplary damages is conduct in outrageous disregard of a plaintiff's rights. It can be awarded, ultimately in the interests of justice, to punish and deter outrageous conduct on the part of a defendant. In this case, the court is of a view that is not a case for exemplary damages.

[27] Having heard the evidences before me and submissions from both learned counsel and after having given much consideration, the court, on the balance of probabilities, finds that the plaintiff's claims against the defendant is allowed with costs.

(a) Defendants to pay the plaintiff a sum of RM3,316,941.60.

(b) Interest at the rate of 5% per annum on the judgment sum from the date of judgment to the date of realisation.

(c) Costs of RM20,000 to be paid by the defendants to the plaintiff.